92-929

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,

Petitioner,

v.

ROBERT R. DAVILA, Assistant Secretary, Office of Special Education and Rehabilitative Services, United States Department of Education,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Department of Education reads part B of the Individuals with Disabilities Education Act ("IDEA-B") as requiring schools to continue to educate disabled students expelled for reasons unrelated to their disabilities (e.g., a deaf student selling drugs on school grounds) even though schools would not continue to educate other students under the same circumstances. The questions presented are:

1. Whether the Department of Education's rule is "interpretive" and thus exempt from notice and comment when the agency's rule contradicts a prior interpretation of the IDEA-B by a federal court of appeals.

2. Whether the rule is exempt from notice and comment because the agency interpreted the IDEA-B, even though the agency also exercised delegated legislative authority with the full force and effect of law that had a substantial impact on schools across the country.

3. Whether the rule can be exempt from notice and comment when Congress delegated lawmaking authority with the express and unique limitation, "No other less formal method of implementing such provision is authorized."

PARTIES BELOW

The parties below include the named plaintiff, Metropolitan School District of Wayne Township, Marion County, Indiana, and a certified class of all public school corporations in the State of Indiana. The defense of the appeal to the Seventh Circuit and this petition have been filed on behalf of the named plaintiff and the certified class.

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METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Metropolitan School District of Wayne Township, Marion County, Indiana (the "School District"), on behalf of itself and all others similarly situated, by counsel, pursuant to S.Ct. Rule 14, respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 969 F.2d 485 and is reprinted in the appendix. Pet. App. A 1a-16a. The district court's opinion is reported at 770 F.Supp. 1331 and is reprinted in the appendix. Pet. App. B 17a-30a.

JURISDICTION

The School District invoked federal jurisdiction in the district court under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. The court of appeals reversed the district court on July 30, 1992 and denied the School District's timely petition for rehearing with suggestion for rehearing *en banc* on September 1, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant section of the Administrative Procedure Act, 5 U.S.C. § 553, is reproduced at Pet. App. C 31a-32a. Relevant sections of part B of the Individuals with Disabilities Education Act, formerly the Education of the Handicapped Act of 1975, 20 U.S.C. §§ 1412, 1417, are reproduced at Pet. App. D 33a-38a.

STATEMENT

Part B of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1411-20 ("IDEA-B" or "Act"), formerly called the Education of the Handicapped Act of 1975, has provided federal funding to states to support the education of disabled children for over fifteen years. In order to qualify for funds, a state must establish a policy assuring a free appropriate education ("FAPE") to all disabled children. 20 U.S.C. § 1412(1). Most states distribute the federal monies to local educational agencies that provide services to eligible children. The Office of Special Education and Rehabilitative Services of the United States Department of Education ("OSERS") administers the Act.

In 1989, Frank E. New, Director of Special Education for the Ohio Department of Education, sent an inquiry to Robert R. Davila, Assistant Secretary for Special Education and Rehabilitative Services. New asked Davila whether the IDEA-B required states to provide educational services to disabled children who were expelled or suspended for reasons unrelated to their disability. For example, consider two students—one deaf and the other with hearing. Assume the two students are selling drugs together on school grounds and that after a case conference, it is determined that deafness has no relationship to drug selling. New's letter asked whether school districts could discontinue educational services to both students or whether FAPE required schools to continue to educate the deaf student but not the hearing student.

Davila wrote a three page response to New (the "New Letter," reprinted Pet. App. E 39a-42a). Davila interpreted the IDEA-B to require states and schools to continue educational services in cases of expulsion even when there was no causal relationship between the student's disability and the conduct. The New Letter states that this interpretation of IDEA-B applies to *all* recipients of funds under the Act.

The Department of Education did not publish the New Letter in the Federal Register or the Code of Federal Regulations. The agency did not solicit public comment before issuing the New Letter. The Department of Education held no public proceedings on the New Letter. These relevant facts are undisputed.

A.
The District Court Proceeding.

The School District brought this action alleging that the New Letter was a legislative rule subject to notice and comment under the Administrative Procedure Act ("APA"). Davila answered that the New Letter was an interpretive rule exempt from the APA's notice and comment requirements. On cross-motions

for summary judgment, the district court framed the issue as whether "the New Letter is a 'legislative rule' requiring notice and comment under the APA, or, . . . merely an 'interpretive rule' exempt from the APA's requirements." Pet. App. 26a.

The district court ruled the New Letter to be a legislative rule subject to notice and comment for, *inter alia*, three reasons. First, the New Letter could not be an interpretation of the IDEA-B because Davila's interpretation was contrary to a prior federal court of appeals interpretation of the IDEA-B. Pet. App. 28a-29a (citing *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), *aff'd on other grounds sub. nom.*, *Honig v. Doe*, 484 U.S. 305 (1988)). Second, the New Letter imposed a new and mandatory duty upon all school districts in the United States without notifying school districts of the change in policy. Pet. App. 28a. Third, the New Letter had a substantial impact on the School District, on the class consisting of all school districts in Indiana, and on all school districts across the country. Pet. App. 19a.

The district court also relied upon the statutory language of the IDEA-B limiting the agency's lawmaking authority. Pet. App. 27a. Congress delegated legislative authority to the agency with the express limitation, "No other less formal method of implementing such provisions is authorized." 20 U.S.C. § 1417(b). In the district court's judgment, the New Letter violated 20 U.S.C. § 1417(b) as well as the APA.

B.
The Court of Appeals' Decision.

The court of appeals reversed the judgment of the district court. The court of appeals held that the notice and comment procedures required by the APA were unnecessary. The New Letter, the court of appeals held, was an interpretation of IDEA-B, not a legislative rule. Pet. App. 12a.

The court of appeals admitted that the distinction between interpretive and legislative rules is "far from crystal-clear." Pet. App. 6a (quoting *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1534 (D.C. Cir. 1989)). The court of appeals continued by noting two different tests for distinguishing interpretive and legislative rules. Pet. App. 7a. The court of appeals applied one test, finding that the other was of "limited value." Pet. App. 8a. Under the test adopted, the court of appeals found that the New Letter was an interpretive rule because (1) the agency said the New Letter was an interpretive rule and (2) the agency rule was based on the language and legislative history of the IDEA-B. Pet. App. 8a-9a, 12a.

The court of appeals did not consider the district court's reliance on the Ninth Circuit's decision in *Maher*, 793 F.2d at 1482. Instead, the Seventh Circuit addressed this Court's affirmance of that decision on other grounds in *Honig v. Doe*, 484 U.S. 305 (1988). Pet. App. 14a-15a. The court of appeals found that *Honig* did not reach the question at issue in this case. Pet. App. 15a.

The court of appeals also did not consider, as the district court did, the substantial impact on the School District. Pet. App. 14a. The court of appeals found that "[p]revailing authority" no longer examined substantial impact as a factor when deciding whether a rule was legislative or interpretive. *Id.* The court of appeals found the district court's reliance on substantial impact to be irrelevant. *Id.*

The court of appeals finally held that the New Letter did not violate 20 U.S.C. § 1417(b). Section 1417(b), the court of appeals reasoned, was designed to ensure that the rules necessary to implement the IDEA-B would be in place early enough to allow states to fulfill their statutory obligations by the effective date of the statute. Pet. App. 15a. The limit on the Department of Education's legislative authority did not apply to the New Letter.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari for three reasons. First, the federal appellate courts use different tests and factors leading to conflicting decisions on whether a particular rule is legislative or interpretive. In this case, the Department of Education's alleged interpretation in the New Letter contradicts a judicial interpretation of the IDEA-B by a federal court of appeals. *Maher*, 793 F.2d at 1482. The New Letter also has a substantial impact on the School District. Some federal appellate courts would find these factors dispositive and hold the rule legislative, while others disregard them as irrelevant and find the rule interpretive. This case is a excellent vehicle to resolve these conflicting tests and factors.

Second, the court of appeals found the New Letter interpretated the IDEA-B and thus was exempt from notice and comment despite the contrary and prior federal court of appeals' interpretation of the IDEA-B. *Maher*, 793 F.2d at 1482. The Seventh Circuit's opinion is in direct conflict with a federal court of appeals' decisions holding that when an agency rule interpreting a statute contradicts a prior interpretation of that same statute by a federal court of appeals, the rule cannot be interpretive despite agency claims to the contrary. *Chamber of Commerce v. OHSA*, 636 F.2d 464 (D.C. Cir. 1980).

Third, the issue of disciplining school children whose conduct is unrelated to their disability differently than other school children for the exact same conduct is of exceptional and manifest national importance. Disparate disciplinary treatment of disabled students erodes the personal responsibility necessary for educational growth. Unequal treatment also has a huge fiscal impact on schools. The School District will be required to spend between $100,000 to $300,000 more per year as a result of the New Letter. The School District is the named plaintiff on

behalf all of Indiana's 392 school districts. The special treatment of disabled students in these circumstances also negatively affects schools beyond Indiana, including all schools in the United States and territories that receive funds under IDEA-B.

I.
THE CONFLICTS IN THE LOWER COURTS IN DISTINGUISHING LEGISLATIVE FROM INTERPRETIVE RULES HAVE ARISEN FROM DOCTRINAL UNCERTAINTY

The APA requires agencies to afford notice of a proposed rule and opportunity for public comment prior to a rule's promulgation. 5 U.S.C. § 553. Congress carved out an exception to the notice and comment requirement for "interpretive rules." 5 U.S.C. § 553(b)(A). Federal courts of appeal have issued conflicting opinions on what agency rules fit within the interpretive rule exception.

The court of appeals in this case admitted that the distinction between interpretive and legislative rules is "far from crystal-clear." Pet. App. 6a (citation omitted). The District of Columbia Circuit stated that the distinction between legislative rules and interpretive rules is "tenuous," "fuzzy," and "blurred." *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted). Other circuits have also noted the doctrinal uncertainty in distinguishing between interpretive and legislative rules. *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission*, 874 F.2d 205, 207 (4th Cir. 1989)("a distinction between 'interpretive' rules and 'something more,' i.e., 'substantive' or 'legislative' rules, is not always easily made"); *Story v. Marsh*, 732 F.2d 1375, 1384 (8th Cir. 1984)("characterization of a rule as substantive or procedural is a matter . . . 'enshrouded in considerable smog'")(citation omitted); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 909 (5th Cir. 1983)(noting "fuzzy perimeters" of interpretative rule exception); *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975) (distinction

"enshrouded in considerable smog"). Administrative law commentator Professor Kenneth Culp Davis stated, "the problem is baffling." 2 Kenneth Culp Davis, *Administrative Law Treatise* §7:5 at 32 (2d ed. 1979).

A.
Different Circuits Apply Different Tests

In this uncertain legal landscape, different tests have been used to determine what qualifies as an interpretive rule exempt from notice and comment. The Seventh Circuit in this case adopted the test set forth in 1984 by the District of Columbia Circuit *en banc*:

> First, the agency's own label, while relevant, is not dispositive.... An interpretative rule simply states what the administrative agency thinks the statute means, and only "'reminds' affected parties of existing duties." On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.

General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984)(en banc), *cert. denied*, 471 U.S. 1561 (1985); Pet. App. 6a-7a. If the agency claims that the rule is interpretive and the agency intends to interpret a statute, then the rule is interpretative and exempt from notice and comment under *General Motors*. In *General Motors*, the court of appeals held the rule to be interpretive.

Three years after the District of Columbia Circuit enunciated the test in *General Motors*, a different panel of that same circuit applied a different test. *Community Nutrition*, 818 F.2d at 946-948. The test focused on two factors. First, whether the language employed by the agency in creating and describing the rule suggested that the agency rule had present binding effect.

The court of appeals wrote, "[M]andatory, definitive language is a powerful, even potentially dispositive, factor suggesting that [agency rules] are substantive." *Id.* at 947. Second, whether the rule limited the agency's discretion. The appellate court stated, "[C]abining of an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule." *Id.* at 948 (citing *Guardian Federal Savings & Loan Association v. FSLIC*, 589 F.2d 658, 666-667 (if so-called interpretive rule "is in purpose or likely effect one that *narrowly limits administrative discretion*, it will be taken for what it is—a binding rule of substantive law")(emphasis added)). In *Community Nutrition*, the court of appeals held the rule to be legislative. *See also State of Alaska v. U.S. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989) (applying *Community Nutrition* test to conclude rule was legislative)).

Another test, one noted by the Seventh Circuit, was developed by Professor Davis for distinguishing interpretive rules from legislative rules:

> [R]ules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them. When an agency has no granted power to make law through rules, the rules it issues are necessarily interpretative; when an agency has such granted power, the rules are interpretative unless it intends to exercise the granted power. . . .

Pet. App. 7a-8a (quoting 2 Kenneth Culp Davis, *Administrative Law Treatise* § 7.10 at 54 (2d ed. 1979)); *see also Chamber of Commerce*, 636 F.2d at 468. If Congress has delegated lawmaking authority to the agency and the agency did not intended to exercise that delegated lawmaking authority, then the agency's rule is interpretive.

The Seventh Circuit found Professor Davis' test to be of "limited value when an agency, like the Department of Education, has both delegated rulemaking authority and the power to issue interpretive rules." Pet. App. 8a. Nonetheless, the court of appeals in *Chamber of Commerce* applied Professor Davis' test to the Department of Labor, an agency with both legislative and interpretive authority. The District of Columbia Circuit in that case held that the Assistant Secretary of Labor had promulgated a legislative rule.

A recent federal court of appeals opinion applied yet another test that turned on whether the agency rule constituted a change in existing law, policy, or practice:

> This court has determined that a rule is substantive if it is promulgated pursuant to a direct delegation of legislative power by Congress and if it changes existing law, policy or practice. A rule is interpretive if it is promulgated by an agency having authority to issue substantive rules and if it attempts to clarify an existing rule but does not change existing law, policy, or practice.

Rocky Mountain Helicopters, Inc. v. FAA, 971 F.2d 544, 546-547 (10th Cir. 1992)(citations omitted). The court of appeals in *Rocky Mountain Helicopters* found the FAA's rule prohibiting night vision goggles did not constitute a change in existing law, policy or practice. *Id.* at 547. The appellate court also noted the lack of a "uniform approach" in deciding whether a rule is legislative or interpretive, giving examples of five different tests. *Id.* at 547 n.2.

B.
Some Circuits Consider The "Substantial Impact" Factor, Others Do Not

In addition to different tests, the courts of appeals conflict on whether substantial impact is a factor to be considered in deciding whether a rule is legislative or interpretive. The district court relied upon the New Letter's substantial impact on the School District and all school districts in Indiana to hold the rule legislative. Pet. App. 19a. The court of appeals found the district court's reliance on substantial impact misplaced, "Prevailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative." Pet. App. 14a (citing *Friedrich v. Secretary of Health & Human Services*, 894 F.2d 829, 836 (6th Cir.), *cert. denied*, 111 S.Ct. 59 (1990); *Industrial Safety Equipment Association, Inc. v. EPA*, 837 F.2d 1115, 1121 (D.C. Cir. 1988); *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1985)).

Other circuits, however, consider substantial impact as one factor in deciding whether a rule is legislative or interpretive. *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1179 (1st Cir. 1992) ("we also look[] to the substantial impact of the rule in determining agency intent. . . . [and] as a sign that the rule is substantive rather than interpretive"); *State of Ohio Department of Human Services v. United States Department of Health*, 862 F.2d 1228, 1233 (6th Cir. 1988)("One factor that courts have considered in distinguishing between legislative and interpretive rules is the impact that a given rule has on those to whom the rule applies."); *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983)(substantial impact "relevant in construing the intent of the agency in issuing the rule."); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701-702 (5th Cir. 1979)(applying "substantial impact"); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 669 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978)(applying "substantial impact"); *National Motor Freight*

Traffic Association v. United States, 268 F.Supp. 90 (D.D.C. 1967)(Burger, McGowan, Sirica, JJ.), *aff'd*, 393 U.S. 18 (1968); 2 Kenneth Culp Davis, *Administrative Law Treatise* § 7:16 at 77-78 (some courts consider whether rule has substantial impact on those it affects).

C.
This Case Is A Good Vehicle To Resolve The Conflict

These different tests and factors that have been fully explored throughout the circuits are more than minor doctrinal differences; they have resulted in different outcomes. This case present a good vehicle to resolve the conflicting tests and factors. In this case, the district court relied upon (1) a prior and contrary interpretation of the IDEA-B by the Ninth Circuit, (2) a change in agency policy, and (3) a substantial impact on the School District and all school districts across the country. From these factors, the district court held that the New Letter was legislative rather than interpretive.

The Seventh Circuit, however, applied a different test neither quoting nor citing in any manner the Ninth Circuit's opinion relied upon by the district court. The court of appeals found that Davila thought the New Letter was an interpretation of the IDEA-B. Pet. App 8a-9a. The appellate court then noted that the New Letter relied upon the language of the statute and its legislative history. Pet. App. 12a. The two parts of the *General Motors* test indicated to the court of appeals that the New Letter was interpretive.

The *General Motors* test applied by the court of appeals, conflicts with this Court's statement that administrative interpretations of statutory terms—normally the subject of interpretive rules—may have legislative effect. *Batterton v. Francis*, 432 U.S. 416 (1977). This Court stated:

> Congress in § 407(a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. . . . In exercising that responsibility, the Secretary adopts regulations with legislative effect.

Id. at 425 (emphasis in original). These interpretations have the "force and effect of law." *Id.* at 425 n.9. One commentator has urged courts to explicitly recognize that interpretive rules with legislative effect are promulgated pursuant to delegated authority to make law through rules therefore making the "interpretation" subject to the notice and comment requirements of § 553 of the APA. Kevin W. Saunders, *Interpretative Rules With Legislative Effect: An Analysis And A Proposal For Public Participation*, 1986 Duke L.J. 346, 382.

Furthermore, in distinguishing between legislative and interpretive rules, courts should pay heed to whether individual rights and obligations are affected. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). Many of the tests and factors adopted by the lower courts turn solely on what the agency intends, rather than whether the agency rule has a substantial impact on individual rights and duties. The doctrinal uncertainty in the appellate courts regarding the distinction between legislative rules and interpretive rules needs to be resolved by this Court.

On a practical level, school districts in the Ninth Circuit are subject to two contradictory rules. In 1986, three years prior to the New Letter, the Ninth Circuit in *Maher* stated:

> We do not hold . . . that a school may never withhold educational services from a handicapped child. If the child's behavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. *See Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342, 248 (5th Cir.) (Unit B), *cert. denied*, 454 U.S.

> 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981); *Doe v. Koger*, 480 F.Supp. 225, 228 (N.D. Ind. 1979). This conclusion does not conflict with the [IDEA-B]. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services—just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that this is not so.

793 F.2d at 1482 (footnote omitted). Schools in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon and Washington do not know whether to follow the Ninth Circuit's binding interpretation of the IDEA-B or the Department of Education's contrary, but likewise binding, interpretation of IDEA-B. Pet. App. 13a.

II.

WHEN AN AGENCY RULE CONTRADICTS A PRIOR FEDERAL COURT OF APPEALS INTERPRETATION THE RULE IS LEGISLATIVE, NOT INTERPRETIVE

The decision of the court of appeals conflicts with *Chamber of Commerce v. OHSA*, 636 F.2d 464 (D.C. Cir. 1980). At issue in that case was the Occupational Safety and Health Act of 1970 ("OSHA Act"), 29 U.S.C. §§ 651-678 (1976), which allows a representative authorized by employees to accompany an inspector during a walkaround inspection of the employee's workplace. The question presented was whether the Occupational Safety and Health Administration ("Administration")

needed to provide notice and comment before requiring employers to compensate employee representatives for their walkaround time.

In November of 1971, a union president filed a complaint with the Secretary of Labor alleging that an employer failed to pay employee representatives for their walkaround time. The Assistant Secretary rejected the union's claim relying in part upon the Solicitor of Labor's opinion that walkaround time was not "hours worked" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o). The union sought judicial relief. The district court upheld the Assistant Secretary's interpretation of the FLSA and OHSA Act.

On appeal, the court of appeals affirmed. *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975). The appellate court held that because walkaround time primarily benefited employees and because the walkaround was conducted beyond the employer's control, walkaround time did not constitute "hours worked" under the FLSA. *Id.* at 1163-1164. Furthermore, inasmuch as neither the terms of the OSHA Act nor its legislative history offered guidance on the payment issue, the court of appeals also held that payment for walkaround time was not so essential to the OSHA Act as to compel an inference of a payment requirement from the OSHA Act itself. *Id.* at 1159-1161.

In March of 1977, a new Assistant Secretary of Labor took office. After conducting a review of the walkaround rule, the Assistant Secretary announced for the first time that "[a]ny employer who fails to compensate employees for walkaround time will be charged with discriminating against their workers under Section 11(c) of the [OSHA Act]." *Chamber of Commerce*, 636 F.2d at 466 (citation omitted). The Solicitor of Labor issued a new opinion stating that an employer's failure to pay workers for walkaround violated § 11(c) of the OSHA Act. On September 20, 1977, without any public proceedings, the Assistant Secretary promulgated what she termed an "interpretive rule and general statement of policy" declaring that "an

employer's failure to pay employees for time during which they are engaged in walkaround inspections is discriminatory under section 11(c)." *Id.* at 467 (citation omitted).

The Chamber of Commerce filed an action in district court challenging the validity of the regulation. The district court held that the regulation was interpretive and therefore exempt from the notice-and-comment requirements of the APA. On review, the court of appeals applied a test similar to the one formulated by Professor Davis:

> A rule is interpretive, rather than legislative, if it is not "issued pursuant to legislatively-delegated power to make rules having the force of law" or if the agency intends the rule to be no more than expression of its construction of a statute or rule.

Id. at 468 (citing *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977)).

Congress had authorized the Secretary of Labor to issue legislative rules regarding workplace inspections. 29 U.S.C. § 657(g)(2) (1976). Ascertaining that an agency intended to exercise its legislative authority presented the District of Columbia Circuit with a "difficult inquiry." 636 F.2d at 468. An agency's own label is indicative but not dispositive; the appellate court did "not classify a rule as interpretive just because the agency says it is." *Id.* (citation omitted). Instead, "it is the substance of what the [agency] has purported to do and has done which is decisive." 636 F.2d at 468 (quoting *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942)).

Despite the Administration's claim that the challenged rule was interpretive, the court of appeals concluded that the agency intended the rule to be legislative. 636 F.2d at 468. In *Leone*, a court of appeals held that neither the terms of the OSHA Act nor the OSHA Act's legislative history nor the policies underlying the employee walkaround right required employers to

compensate employees for walkaround time. 523 F.2d at 1159-1161. The appellate court reminded the Administration that statutory interpretation by an agency is not controlling on a court. 636 F.2d at 469 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

The effect of the Administration's rule exposed the agency's intent. The Administration could not be explaining or clarifying the OSHA Act's language, for, as the court of appeals concluded in *Leone*, the OSHA Act neither prohibits nor compels pay for walkaround time. There was no "existing duty" to serve as the subject of an Administration reminder. Congress had not "legislated and indicated its will" on the question of walkaround pay, therefore the Administration must have done more than exercise its "'power to fill up the details.'" 636 F.2d at 469 (quoting *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). The court of appeals stated, "It is clear to us that the Administration has attempted through the regulation to supplement the [OSHA] Act, not simply to construe it, and therefore the regulation must be treated as legislative." 636 F.2d at 469.

In this case, the effect of the New Letter exposed the Department of Education's intent. The agency could not be explaining or clarifying the IDEA-B's language, for, as the court of appeals concluded in *Maher*, the IDEA-B neither prohibits nor compels schools to continue to educate disabled students disciplined for reasons found to be unrelated to the student's disability. There was no "existing duty" to serve as the subject of Assistant Secretary Davila's reminder. Congress had not legislated and indicated its will on the question of continuation of educational services when the improper conduct is unrelated to the student's disability, therefore the agency must have done more than exercise its power to fill up the details. The

Department of Education in the New Letter has attempted through regulation to supplement the IDEA-B, not to construe it. The New Letter must be treated as legislative.

Chamber of Commerce directly conflicts with the court of appeals opinion at issue in this petition. The *Leone* decision interpreted the OSHA Act like the *Maher* decision interpreted the IDEA-B: no duty arose from the statute. The Assistant Secretary of Labor interpreted the OSHA Act after *Leone* to require walkaround pay, and the Assistant Secretary of Education interpreted the IDEA-B after *Maher* to require the continuation of educational services when disabled students are expelled or suspended for reasons unrelated to the student's disability. Both the Assistant Secretary of Labor and the Assistant Secretary of Education claimed the agency rule was interpretive and thus exempt from notice and comment. The District of Columbia Circuit in *Chamber of Commerce* required notice and comment despite the agency's claim that the rule was interpretive, while the Seventh Circuit in this case found the agency rule was interpretive and thus exempt from notice and comment.

Chamber of Commerce remains good law today. The District of Columbia Circuit cited the opinion less than one month ago when invalidating a Department of Health and Human Services rule prohibiting counseling on abortion. *National Family Planning and Reproductive Health Associations, Inc. v. Sullivan*, No. 92-5252, 1992 U.S. App. LEXIS 28469 (D.C. Cir. Nov. 3, 1992). The appellate court stated , "The proper distinction between legislative and interpretive rules is shown even more clearly in *Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C. Cir. 1975)." *Id.* at * 27. The conflicting tests and factors have resulted in conflicting results; the court of appeals decision cannot be squared with *Chamber of Commerce*.

III.
THE NEW LETTER RAISES ISSUES FOR SCHOOL DISTRICTS ACROSS THE COUNTRY THAT ARE OF MANIFEST NATIONAL IMPORTANCE

The validity of the New Letter as promulgated, without notice and comment, affects all school districts across the United States and territories. To comply with the additional duty, the School District will be required to spend an additional $100,000 to $300,000 per year. All school districts in Indiana are a part of this suit. Overall, Indiana receives over $35 million of IDEA-B funds which are now tied to the mandatory requirements of the New Letter.

The New Letter also applies to all states and school districts across the country. Pet. App. 41a. School districts from Maine to Hawaii that receive IDEA-B funds now are obliged to continue educational services even if the disabled student is disciplined for reasons unrelated to the student's handicap. The California Department of Education and the New York State School Boards Association, representing two of the nation's largest educational systems, have filed *amicus curiae* briefs in support of this petition. This case involves more than the School District, more than the school districts in Indiana, it involves every school district in the nation.

Although the fiscal impact of the New Letter is dramatic in these times of declining educational budgets, the individuals who stand to lose the most are the disabled students. Because of the New Letter disabled students will receive the message that they will be allowed to continue their studies despite serious violation of school rules. This case does not involve schools disciplining disabled students for actions directly related to their disabilities as was the case prior to the IDEA-B. Instead it involves disparate treatment of two students who commit similar acts in violation of the school code simply based upon the fact that a student receives services for a disability. The School District on behalf of all Indiana school districts asks only for an opportunity to express to the Department of Education the

devastating effect such disparate treatment will have upon the mission of the public school to instill self-discipline in all students, disabled a well as non-disabled. This is best done through the vehicle enacted by Congress for the purpose of obtaining public input in the regulatory area, the APA.

In enacting the IDEA-B, Congress delegated to the Department of Education the authority to make law under the IDEA-B. Congress, however, limited that agency's lawmaking authority in a unique manner:

> In carrying out the provision of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

20 U.S.C. § 1417(b). The court of appeals held that Congress designed this section to "ensure that the rules necessary to implement the [IDEA-B] would be in place early enough to allow states to fulfill their statutory obligation by the effective date of the Act." Pet. App. 15a (citing Appellant's Brief at 5-6).

Contrary to the Department of Education's unsupported assertion in its brief, § 1417(b) is not limited to the initial implementation of the IDEA-B. Such a construction of the statute renders the terms "amend" and "revoke" in § 1417(b) to be a dead letter:

> In carrying out the provision of this subchapter, the Secretary shall . . . *amend*, and *revoke* such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

20 U.S.C. § 1417(b)(emphasis added). Section 1417(b) should not be construed to make the terms "amend" and "revoke" meaningless surplusage. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (an elementary canon of construction is that a statute should not be interpreted so as to render one part inoperative).

In addition to the democratic principles provided by the APA, Congress expressly limited the Department of Education's rulemaking in this delicate and sensitive area of education: "No other less formal method of implementing such provision is authorized." 20 U.S.C. § 1417(b). The court of appeals has construed the APA and this limitation in the IDEA-B to prohibit the School District, all school districts in Indiana, and all schools from across the country from receiving notice of and commenting on a Department of Education rule that will ultimately prove detrimental to students with disabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 27, 1992

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-3386

METROPOLITAN SCHOOL DISTRICT
OF WAYNE TOWNSHIP, MARION COUNTY,
INDIANA, on behalf of itself and
all others similarly situated,

Plaintiff-Appellee,

v.

ROBERT R. DAVILA, Assistant Secretary,
Office of Special Education
and Rehabilitative Services,
United States Department of Education,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 90 C 1435—S. **Hugh Dillin**, *Judge*.

ARGUED MAY 20, 1992—DECIDED JULY 30, 1992

Before BAUER, *Chief Judge*, POSNER, *Circuit Judge*, and GIBSON, *Senior Circuit Judge*.[1]

[1] The Honorable Floyd R. Gibson, Senior Judge for the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

BAUER, *Chief Judge.* In this appeal, Robert Davila on behalf of the United States Department of Education challenges the district court's grant of summary judgment in favor of the Metropolitan School District of Wayne Township and the plaintiff class. The district court held that a letter purporting to interpret part B of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1411-20 ("the IDEA-B" or "the Act"),[2] was a legislative ruling subject to the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553 ("APA"). We reverse, and remand for entry of summary judgment in favor of Davila and the Department of Education.

I.

The IDEA-B provides federal funding to states to support the education of disabled children. In order to qualify for funds, a state must establish a policy assuring a free appropriate education ("FAPE") to all disabled children. 20 U.S.C. § 1412(1). Most states distribute the federal monies to local educational agencies that provide services to eligible children. The Office of Special Education and Rehabilitative Services of the United States Department of Education ("OSERS") administers the Act. The rule at issue here was announced by OSERS in a letter written by Davila, the Assistant Secretary for Special Education and Rehabilitative Services, in response to an inquiry from Frank E. New, the Director of Special Education for the Ohio Department of Education.

New asked whether the IDEA requires states to provide educational services to disabled children who are expelled or suspended for an extended period for reasons unrelated to their disability. In his letter, Davila stated that OSERS interpreted the IDEA to require states to

[2] This Act formerly was called the Education of the Handicapped Act of 1975. Congress changed the name, effective October 30, 1990.

continue services in these circumstances. The relevant facts are undisputed: this position was not published in the Federal Register or the Code of Federal Regulations, and public comments were not solicited before it was issued.

The School District for Wayne Township sued the Secretary on behalf of itself and all similarly situated providers of educational services. The School District asserts that OSERS' position places a large financial burden on school districts, and that the districts are entitled to notice of the proposed rule and the opportunity to comment. Both parties filed motions for summary judgment. The district court agreed with the School District that OSERS' position is a legislative rule subject to the notice and comment requirements of the APA. *Metropolitan School District of Wayne Township v. Davila*, 770 F. Supp. 1331 (S.D. Ind. 1990). The district court acknowledged that "the issue is whether . . . the New Letter is a 'legislative rule' requiring notice and comment under the APA, or . . . merely an 'interpretive rule' exempt from the APA's requirements." *Id.* at 1337.

The court applied a three-factor test to determine that the position taken in the letter is "substantive," and therefore subject to the notice and comment requirements of § 553 of the APA and to the restrictions of 20 U.S.C. § 1417(b), the section of the IDEA delegating law-making authority to the Department of Education. *Id.* at 1338. These factors were: "(1) it imposes a new and mandatory duty upon all school districts in the United States, (2) the new duty is not expressly required by EHA [now IDEA], and (3) contrary to the New Letter itself it is not required by *Honig v. Doe*, 484 U.S. 305 (1988)." 770 F. Supp. at 1338.

We believe the district court used "substantive" as a synonym for "legislative." This usage appears in several other district court opinions, most notably in the one upon which the district court relied to develop its three-factor test. *See National Treasury Employees Union v. Reagan*,

685 F. Supp. 1346, 1356 (E.D. La. 1988). *See also Energy Reserves Group v. Federal Energy Administration*, 447 F. Supp. 1135 (D. Kansas 1978). In reviewing (and reversing) *Energy Reserves*, the Temporary Emergency Court of Appeals treated "substantive" in this context as a synonym for "legislative." *Energy Reserves Group v. Federal Energy Administration*, 589 F.2d 1082, 1089 (Temp. Emer. Ct. App. 1978). *See also American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). For these reasons, we believe the district court here also used the terms interchangeably.

In addition to its holding that the APA requires OSERS to follow the notice and comment procedures before promulgating the position expressed in Davila's letter to New, the district court found that 20 U.S.C. § 1417(b) requires these procedures. Section 1417(b) provides:

> In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

The district court interpreted this language to require that any rules the Department proposed under the Act be published in the Federal Register. *Id.* at 1337. Based upon its holding that the position announced in Davila's letter to New is "substantive" (legislative), and its reading of § 1417(b), the court concluded that the rule is invalid because OSERS failed to follow the notice and comment procedures of the APA. We find the use of the term "substantive" in this context misleading; an interpretation which explains the meaning of the statute can be just as "substantive" as a legislative rule. We prefer the interpretive/legislative terminology because it avoids any potential confusion.

II.

It is well established that review of a district court's grant of summary judgment is *de novo*. *See, e.g., La Preferida,*

Inc. v. Cerveceria Modelo, S.A., 914 F.2d 900, 905 (7th Cir. 1990). In order to uphold a grant of summary judgment, we must "view the record and all inferences drawn from it in the light most favorable to the party opposing the motion," *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir. 1990), and conclude that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *First Wisconsin Trust Co. v. Schroud*, 916 F. 394, 398 (7th Cir. 1990).

In this case, we believe Davila and the Department of Education are entitled to judgment as a matter of law. The APA does not require administrative agencies to follow notice and comment procedures in all situations. Section 553(b)(3)(A) specifically excludes "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," from the notice and comment procedures. *See e.g., Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (discussing "information letters" containing statements which begin: "The staff's position is . . .") (quoted in *Industrial Safety Equipment Association, Inc. v. EPA*, 837 F.2d 1115, 1121 n.11 (D.C. Cir. 1988)). Based upon our review of Davila's letter and controlling authority, we conclude that the letter announced OSERS' construction of the IDEA, and hence is an interpretive rule that does not trigger the APA's notice and comment requirements.

We note briefly that this issue is ripe for review. Preenforcement review is appropriate here because the Department of Education has issued its final pronouncement on the subject, and the School District and other plaintiffs must either comply with the Department's interpretation or face potential sanctions. The Department's position mandates that states provide educational services to expelled disabled children in order to comply with the IDEA. "If a rule of conduct cannot be challenged in advance of violating it, the people subject to it are placed in a dilemma: comply with a rule that harms them and that they believe to be invalid or violate the rule at the

risk of a heavy penalty if they've guessed wrong and the rule is upheld in the penalty proceeding." *Abbs v. Sullivan*, Nos. 91-1923, 91-1924, & 91-2429 1992 U.S. App. LEXIS 111489 (7th Cir. May 1, 1992) (citing 4 Kenneth Culp Davis, *Administrative Law Treatise* § 25:6, at p. 369 (2d ed. 1983)). In this situation, the rule can be challenged directly. *Id.*

"The distinction between interpretive (or 'interpretative') and substantive (or 'legislative') rules is admittedly far from crystal-clear." *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1534 (D.C. Cir. 1989) (citing *American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)). *Chemical Waste* considered an EPA interpretation of a regulation which provides: "any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any leachate is a hazardous waste." 40 C.F.R. § 261.3(c)(2)(i). The EPA determined that the hazardousness of waste does not depend upon the time of its disposal, and thus materials found to be hazardous after disposal could produce hazardous byproducts requiring treatment. The court found this was a clarification of an existing regulation and hence an interpretive rule. This interpretation required treatment of materials that heretofore had not been covered by the regulation. This new obligation did not render the EPA's reading of the regulation legislative.

But we are getting ahead of ourselves. The District of Columbia Circuit, sitting *en banc*, has set forth the general principles to be used to determine whether a rule is interpretive, and, therefore, exempt from APA's notice and comment requirements. The "starting point" of the analysis is the agency's characterization of the rule. *General Motors Corp. v. Ruckleshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1074 (1985); *United Technologies Corp. v. United States Environmental Protection Agency*, 821 F.2d 714, 718 (D.C. Cir. 1987). The agency's characterization is not dispositive, but is a relevant factor. *United Technologies*, 821 F.2d at 718;

General Motors, 742 F.2d at 1565; *see also Friedrich v. Secretary of Health & Human Services*, 894 F.2d 829, 834-35 (6th Cir.) (noting Sixth Circuit's adoption of principles set out in *General Motors*), *cert. denied*, 111 S. Ct. 59 (1990).

After considering the agency's characterization, the *General Motors* court outlined the more general distinction between interpretive and legislative rules:

> An interpretive rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights, or duties, the rule is properly considered to be a legislative rule.

United Technologies, 821 F.2d at 718 (quoting *General Motors*, 741 F.2d at 1565). The court in *United Technologies* reviewed the *General Motors* holding, finding that "the entire justification for the rule [reviewed in *General Motors*] was comprised of reasoned statutory interpretation, with reference to the language, purpose, and legislative history of the statute. *Id.* In other words, " 'interpretive rules are statements as to what the administrative officer thinks the statute or regulation means,' whereas legislative rules have 'effects *completely independent* of the statute.' " *Id.* (quoting *Cabais v. Egger*, 690 F.2d 234, 238 & n.9 (D.C. Cir. 1982)) (emphasis in original).

This court has noted with approval Professor Davis' test for distinguishing interpretive from legislative rules. *Production Tool v. Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir. 1982) (quoting 2 Kenneth Culp Davis, *Administrative Law Treatise* § 7.10 at 54 (2d ed. 1979)). Davis' formulation provides:

> [R]ules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them. When an agency has no granted power to make law through rules,

> the rules it issues are necessarily interpretative; when an agency has such granted power, the rules are interpretative unless it intends to exercise the granted power. . . .

Id. As we pointed out in *Production Tool*, Professor Davis' formulation focuses upon the kind of power the agency is using, and hence the force and effect of the rule. Legislative rules have the force and effect of law—they are as binding upon courts as congressional enactments. *Id.* at 1165. Interpretive rules, although they are entitled to deference, do not bind reviewing courts. *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977); *Production Tool*, 668 F.2d at 1165. But this formulation is of limited value when an agency, like the Department of Education, has both delegated rulemaking authority and the power to issue interpretive rules. All agencies charged with enforcing and administering a statute have "inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." *Production Tool*, 680 F.2d at 1166 (citing *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)). *See also American Trucking Association, Inc. v. United States*, 688 F.2d 1337, 1341 n.5 (11th Cir. 1982), *rev'd sub nom. on other grounds, Interstate Commerce Commission v. American Trucking Association*, 467 U.S. 354 (1984) (extending agency's authority). Basically, then, this test returns us to the starting point set forth by the District of Columbia Circuit—what kind of rule does the agency think it has promulgated?

Here, Secretary Davila's letter purports to be an interpretation of the IDEA. Davila based the OSERS' interpretation upon the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988), and other cases interpreting IDEA, the language of both the statute and an implementing regulation (34 C.F.R. § 300.121(a)), and the legislative history of the Act. These are the classic tools a reviewing body, be it court or agency, relies upon to determine the meaning of a statute. Thus, the first factor

in our analysis, and an "important" one according to the governing authority, weighs in favor of a determination that the rule is interpretive. *Friedrich*, 894 F.2d at 835.

Under the more general inquiry, we must determine whether the rule merely states what OSERS thinks the statute means, or creates new law, rights, or duties. *Id.*; *United Technologies*, 821 F.2d at 718. We note that a new position does not necessarily make a rule legislative rather than interpretive. *State of Michigan v. Thomas*, 805 F.2d 176, 182-84 (6th Cir. 1986); *Alcarez v. Block*, 746 F.2d 593, 613-14 (9th Cir. 1984); *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 559-60 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

The district court held that the letter announced a "change in long standing policy of OSERS without a corresponding change in the underlying statute or regulations." *Metropolitan School District*, 707 F. Supp. at 1337. This holding is factually incorrect and, in this case, legally irrelevant. There is nothing in the record to indicate that OSERS' position is a change in policy—in fact, it appears that the question of whether schools that expel disabled students for reasons unrelated to their disability must continue to provide services, had not been considered before May 1989. In May, a Maryland education official raised the question, and OSERS responded in an unpublished letter that states must continue to provide some form of services. *See* Appellants' Brief at 7. Because there was no published policy, Frank New asked OSERS about the issue when it arose in Ohio.

The School District points to a Memorandum issued by the Office of Special Education Programs (a division of OSERS), to support its argument that the agency's position is a change in policy. *See* Appellees' Brief at 28 (citing Memorandum 87-21, 202 EHLR (Education for the Handicapped Law Report) 372 (June 29, 1987)). The Memorandum lists and answers questions about the Act posed by state special education directors. The School District asserts that the following question and answer state a

policy contrary to that announced in the letter to Frank New:

> Q. What are the issues and requirements related to suspension and expulsion?
>
> A. This is a complex area in which we are currently better able to articulate the issues than the answers. It is also relevant that the Supreme Court has decided to hear a case involving suspension and expulsion. Supreme Court review was requested by Superintendent Honig of California, and will take place some time after October 1, 1987.
>
> OSEP's position is that a suspension or expulsion of more than ten days' duration constitutes a change in placement which would trigger the procedures and protections of the EHA-B. . . . Some courts looking at the discipline issue under both EHA-B and Section 504 [of the Rehabilitation Act of 1973] have said that, when the misbehavior is unrelated to the handicapping condition, the child can be disciplined without regard to the fact that the child has a handicap. This is of interest because the basis for this under the EHA-B is not entirely clear. While this may deserve further thought, OSEP will not apply a rule or guideline contrary to this in the absence of a generally applicable statement distributed in advance to the states.

Memorandum 87-21, 202 EHLR at 374, question 8. But this response only discusses whether a school can suspend or expel a disabled student (for reasons unrelated to his disability), not whether some educational services must be provided once the student is expelled. As counsel for the Department pointed out at oral argument, until recently it was unclear whether disabled children could be disciplined at all under the Act. *Honig v. Doe* resolved this question in the affirmative. 484 U.S. 305 (1988). The Memorandum does not support the position that the letter announced a change in longstanding agency policy.

In this case, the treatment of children expelled for reasons unrelated to their disabilities has never arisen. Under the plaintiffs' reasoning, any expression of agency opinion on the subject necessarily would be new and, therefore, legislative. This line of reasoning was rejected implicitly in *American Postal Workers*, 707 F.2d at 558. In that case, the Postal Service changed the computation formula for retirement benefits for its workers. The change in the formula reduced the expected benefits of 113,000 future retirees. *Id.* at 549. Notwithstanding the "newness" of the rule, the court found that the new rule met the "classic definition of an interpretive rule" because it "merely interpreted the term 'average pay' as applied to PTF's [part-time flexible employees] to include only pay actually earned." *Id.* at 559.

Similarly, in *Thomas*, the Environmental Protection Agency refused to accept Michigan's proposed fugitive dust regulations although they were nearly identical to regulations approved five years before. 805 F.2d at 180-81. After it approved the earlier regulations, the EPA modified its definition of "reasonably available control technology ("RACT")." *Id.* at 180. EPA informed the state that it should use the more rigorous definition of RACT. It stated that new information and "increased Agency concern that rules be specific" meant that it might not approve Michigan's proposed rules. *Id.* at 181. This was so even though the statute being interpreted, Part D of the Clean Air Act, 42 U.S.C. § 7502(b)(3), remained unchanged. The Sixth Circuit held that the EPA's revised definition of "reasonably available control technology," which required more detail than the old one, was interpretive. *Id.* at 183. The "definition clearly harmonizes with the language and purpose of . . . the Clean Air Act . . . and does not create any new law, rights or duties." *Id.* (quotations omitted).

These cases show that an agency's change in its reading of a statute does not necessarily make the rule announcing the change legislative. That rules "may have altered administrative duties or other hardships does not make them substantive [legislative]." *Alcarez v. Block*, 746 F.2d

543, 613 (9th Cir. 1983). Further, as we have pointed out, the issue here is a new one, and the agency's ruling does not constitute a change in policy.

The rule announced in Davila's letter satisfies the general test of an interpretive rule. It relies upon the language of the statute and its legislative history to determine "that Congress did not intend for educational services to cease for children with handicaps who were removed from schools as a result of behavioral problems." Davila Letter at 3, Appellants' Appendix at 19. This represents the paradigmatic case of an interpretive rule. *See United Technologies*, 821 F.2d at 718. OSERS has simply stated what it thinks the IDEA-B requires. *See id.*; *Production Tool*, 688 F.2d at 1165-67. *See also American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (interpretive rules "merely explicat[e] Congress' desires"). The rule is based on specific statutory provisions ("all handicapped children"), and its validity stands or falls on the correctness of the agency's interpretation of the statute. In these circumstances, it is clear that the rule is an interpretive one. *See United Technologies*, 821 F.2d at 719-20.

At oral argument, counsel for the School District asserted that Davila's letter to New constituted a legislative rule for three reasons: the Department of Education has delegated law-making authority from Congress; Davila's interpretation is mandatory and binding; and it is a new rule. Unfortunately for the School District, these factors do not control the determination of whether an agency has promulgated a legislative or interpretive rule. We already have discussed and rejected the contention that "new" rules are always legislative. The remaining arguments are also without merit.

Simply because an agency has the power to enact legislative rules does not mean that it has exercised that power. As we have noted, all agencies with power to administer statutes also have the authority to interpret them. *See discussion supra* at 10. If the mere delegation of rule-making authority meant all subsequent agency de-

terminations were legislative, and had to meet the notice and comment requirements of the APA, agency functioning would be hamstrung. The ability to issue interpretive rules "preserve[s] agency flexibility" and "allow[s] agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings." *American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). *See, e.g., United Technologies*, 821 F.2d at 714 (EPA has both rule-making authority, yet issued interpretive rule); *American Trucking Association*, 688 F.2d at 1337 (Interstate Commerce Commission has both, issued interpretive rules); *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978) (Federal Energy Administration has both, issued interpretive rules).

The second factor the School District relied upon at oral argument similarly is flawed. All rules which interpret the underlying statute must be binding because they set forth what the agency believes is congressional intent. Could an agency announce, "We think Congress intended this when it enacted this statute, but you don't have to do it."? Courts are not bound by an agency's interpretation, as we have discussed *supra*, but parties regulated by the statute certainly are. *Alcarez*, 746 F.2d at 614. The court in *Alcarez* rejected the plaintiff's argument that a binding rule is necessarily a legislative one. *Id.* "[A]ll rules are 'binding' on the regulated parties in the sense that they set, for the time, the legal minima of behavioral standards. The extent to which regulations are 'binding' in comparison to one another, however, is only an effect of the distinction between substantive and interpretive rules, not a criterion of the distinction." *Id.* As we discussed, the nature of the rule dictates the degree of deference it receives from a reviewing court.

Further, as we pointed out in *Production Tool*, "a rule affecting rights and obligations is [not] *ipso facto* legislative." 688 F.2d at 1166. *See also American Postal Workers*, 707 F.2d at 559 (conclusive change in benefits calculation formula is interpretive). "The fact that *burdens* were im-

posed on . . . plaintiffs only goes to the substantial impact of the statute and the regulations, not whether the regulations created law." *Alcarez*, 746 F.2d at 613. "[P]enalizing the agency for explaining what was for the plaintiffs bad news about [the IDEA], by labeling the explanation 'substantive,' would be like killing the messenger." *Id.* at 614. Davila's letter simply explained what the statute already requires.

Prevailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative. *Friedrich v. Secretary of Health & Human Services*, 894 F.2d 829, 836 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 59 (1990); *Industrial Safety Equipment Association, Inc. v. EPA*, 837 F.2d 1115, 1121 (D.C. Cir. 1988); *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1985). The district court relied in part upon this rationale to find that Davila's letter announced a legislative rule. "[T]he impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals." *Id.* at 560. The district court's reliance upon this rationale thus is misplaced.

The district court also found Davila's interpretation of the IDEA was a legislative rule because it found that continuing services are "not expressly required" by the Act. But this rationale again implicitly rejects OSERS' inherent authority to interpret its governing statute. If the IDEA expressly required services to continue after expulsion, there would be no need for OSERS to interpret congressional intent on the subject.

The district court's final reason for holding that OSERS' interpretation of the IDEA was a legislative rather than interpretive rule also misconceives the governing test. The court did not approve of the agency's interpretation of *Honig v. Doe*.

> If the Supreme Court's opinion in *Honig* means what the defendant seems to think it means, i.e., that the

> Act indeed requires what his letter mandates, then the letter could perhaps be construed a interpretive.

770 F. Supp. at 1338. In other words, because the district court disagreed with OSERS' interpretation of *Honig* and the statute, the interpretation must be legislative, and thus in violation of the APA. The School District also raises this argument on appeal—because *Honig* does not dictate OSERS' interpretation, that 'interpretation' must be legislative. *Honig* did not reach this issue—it noted that students could be suspended for behavior related to their disability that poses an immediate threat to others. 484 U.S. at 325. But OSERS' letter did not contend that *Honig* resolved the issue. The district court seems to hold that because *Honig* did not offer the interpretation adopted by OSERS, the interpretation must be legislative. This reasoning is in error. Simply because a reviewing court disagrees with an agency interpretation does not render it legislative. An agency has "inherent authority to issue interpretive rules informing the public of the . . . standards it intends to apply in exercising its discretion." *Production Tool*, 688 F.2d at 1166. Further, the School District has only challenged the OSERS' authority to issue its interpretation, not the interpretation itself. Of course, if the school district were entirely happy with OSERS' reading of IDEA-B, this case would not be before us. Nevertheless, a reviewing court's disagreement with the substance of an agency's interpretive rule does not render the interpretive rule legislative.

Finally, we do not believe that the provision of the IDEA that delegates rulemaking authority to the Department of Education, 20 U.S.C. § 1417(b), requires OSERS to promulgate its interpretation of the Act through notice and comment. *See* 770 F. Supp. at 1337. This section was designed to ensure that the rules necessary to implement the Act would be in place early enough to allow states to fulfill their statutory obligations by the effective date of the Act. *See* Appellants' Brief at 5-6. Moreover, as we have discussed, a grant of legislative authority (and the agency's exercise of that authority) does not remove the

agency's inherent authority to issue interpretive rules. The School District fundamentally misapprehends § 1417(b), as well as the agency's inherent rulemaking authority. This delegation authorizes legislative rulemaking, it does not revoke interpretive authority.

III.

For the foregoing reasons, the decision of the district court is REVERSED, and the case is REMANDED for entry of summary judgment in favor of Davila and the Department of Education.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—7-30-92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,	)	
Plaintiff,	)	CIVIL ACTION NO. IP 90-1435-C
v.	)	
ROBERT R. DAVILA, ASSISTANT SECRETARY, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, UNITED STATES DEPARTMENT OF EDUCATION,	)	
Defendant.	)	

DILLIN, District Judge.

August 13, 1991

This matter comes before the Court on Defendant Robert R. Davila's motion to dismiss, Plaintiff Metropolitan School District of Wayne Township's motion for summary judgment, and on Defendant Robert R. Davila's cross motion for summary judgment. For the following reasons, Robert R. Davila's motion

to dismiss is denied, Metropolitan School District of Wayne Township's motion for summary judgment is granted, and Robert R. Davila's cross motion for summary judgment is denied.

BACKGROUND

Plaintiff Metropolitan School District of Wayne Township, Marion County (School District), is a local school in the State of Indiana. Plaintiff's action has been certified as a class action pursuant to rule 23(b)(2), Fed.R.Civ.P. The class consists of all public school corporations in the State of Indiana. The School District and the plaintiff's class receive funding under part B of the Education of the Handicapped Act (EHA-B), 20 U.S.C. §§ 1401-85. Under EHA-B, the federal government provides funds to individual states, which then distribute the funds to local school districts to provide educational services to handicapped children. To be eligible for funding, EHA-B requires that states have in effect a policy that assures a free appropriate education (FAPE) to all handicapped children. 20 U.S.C. § 1412(1).

The Office of Special Education and Rehabilitative Services (OSERS), United States Department of Education, is the agency in charge of EHA-B administration. Prior to September 15, 1989, there was no OSERS requirement of any kind that educational services must be provided to handicapped students during periods of expulsion or suspension not casually related to the student's handicap. The School District did not continue education services to such expelled students, nor was it required to do so by the State of Indiana as a condition of obtaining EHA-B funds.

Defendant Robert Davila (Davila) is the Assistant Secretary in charge of OSERS. On September 15, 1989, Davila authored a letter to Frank E. New (New Letter) of the Ohio Department of Education. In the New Letter, OSERS, through Davila, expressed its view that the statutory requirement that a FAPE be

provided to "all" handicapped children, applies to handicapped children during periods of long-term suspension or expulsion resulting from misbehavior that is not a manifestation of the child's handicap.

The New Letter was not published in the Federal Register or the Code of Federal Regulations. It was, however, made available for general publication in the Education for the Handicapped Law Report (EHLR). Paul Ash, Director of Special Education, Indiana Department of Education (Ash), initially read the letter in the EHLR and, based upon the letter, now requires the School District, and the plaintiff's class, to continue services in Indiana for expelled or suspended handicapped children. The School District estimates that the additional cost to it alone to comply with this requirement, based upon previous years expulsion figures, is $100,000 to $300,000 per year.

The present litigation arises out of the School District's complaint filed June 8, 1990. In its complaint, the School District alleges that Davila, through the New Letter, has promulgated a legislative rule without following the public notice and comment procedures mandated by the Administrative Procedure Act (APA), 5 U.S.C. § 553. Davila, and OSERS, contend that the New Letter is an interpretation of EHA-B, and, as such, is not subject to the notice and comment requirements of the APA.

DISCUSSION

Davila has moved this Court for an Order dismissing the School District's complaint. Both parties have also filed motions for summary judgment. As the motion to dismiss is potentially dispositive, judicial economy requires that it be considered first.

Motion to Dismiss

In support of his motion, Davila raises four grounds for dismissal: [1] this Court lacks personal jurisidiction over Davila in his individual capacity; [2] the school district has not stated

a claim against Davila in his individual capacity for which relief can be granted; [3] the school district lacks standing to bring this action; and [4] this action is not ripe for review.

Davila's first and second grounds for dismissal relate to the School District's claims against Davila in his individual capacity. However, the School District has stated that because of "the urgency of this matter . . .and the fact that this dispute goes to form rather than substance, plaintiff is willing to proceed at this stage against defendant in his official capacity to avoid any further procedural delays." In light of this statement, the Court grants the School District's request to amend its complaint by interlineation in order to make clear that this action is against Davila only in his official capacity. This being so, the Court finds that Davila's first two grounds for dismissal are denied as moot.

Davila's third ground for dismissal is that the School District lacks standing. To have "standing" means that the party bringing suit has a sufficient stake to obtain judicial resolution of that controversy. *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636, 641 (1972). The Supreme Court has set forth three elements that the School District must satisfy to have standing: (1) the Plaintiff "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"; (2) the injury "fairly can be traced to the challenged action" of the defendants; and (3) the injury "is likely to be redressed" by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700, 709 (1982).

Davila first contends that the School District has not suffered a sufficient actual or threatened injury. In support, Davila asserts that any injury threatened to the School District is speculative. Davila argues that the threatened injury is speculative for the following reasons: it is not certain that there will be expulsions of handicapped children from the school; the state

has not yet approved an EHA-B plan requiring expenditures for expelled children; Indiana itself, as opposed to the School District, may opt to provide the out-of-school services; and, the School District could seek redress through administrative processes which might eliminate the injury.

The School District states that its injury in the present action is the application of an illegal governmental decision by a governmental official under color of law. *See Black & Decker Corp. v. American Standard, Inc.*, 679 F.Supp. 1183, 1190 (D.Del.1988)("the actual or threatened 'injury' from which Plaintiffs suffer is that Plaintiffs are subject to the requirements of an allegedly unconstitutionally statute"). Specifically, the School District contends that application of the New Letter will require the School District to spend between $100,000 and $300,000, and force it to acquire additional personnel in the coming school year.

In support of its contention that this injury is not too speculative, the School District has adduced proof that Indiana's Final State Plan for fiscal years 1991-93 requires services to be continued for students who have been suspended or expelled for reasons not casually related to their handicaps. According to Ash, this is a change in the Indiana Plan, dictated by the New Letter and rulings of OSERS pursuant thereto.

Finally, the School District relies on the affidavit of Dr. Edward Bowes (Bowes), the Superintendent of the School District since 1978. Bowes states that during the 1989-90 school year 18 handicapped students were expelled for non-handicapped-related reasons, and that there is no reason not to expect similar actions in the future.

The Court finds that the School District has stated a sufficient threatened injury, and that the testimony of Ash, combined with the affidavit of Bowes, shows that the injury is not so speculative as to defeat the School District's standing. In

addition, the Court has not been persuaded that there is administrative review which could redress the School District's charge that Davila exceeded his statutory authority.

Davila next asserts that even if the School District has stated a threatened injury, it has not shown that this injury can be traced to Davila's actions. In support, Davila vaguely argues that the School District's injury cannot be traced to him because the State of Indiana may have been able to arrive at Davila's position expressed in the New Letter independently. *See Von Aulock v. Smith*, 720 F.2d 176, 181 (D.C.Cir.1983)(in regard to standing, "the indirectness of the injury . . . may make it more difficult to meet the minimum requirement of Article III").

In opposition, the School District argues that Ash's deposition disposes of the traceability issue. As Davila contends, Ash does state that before the New Letter was issued the Indiana Department of Education's legal department may have taken various positions regarding the issue considered in the New Letter. However, Ash also states that based upon the New Letter, he believes continued services are now required, where before they were not.

The Court finds that the School District's threatened injury is traceable to the New Letter, and consequently the actions of Davila. Thus, Davila's motion to dismiss fails on this issue.

Davila argues that the "appropriate relief if plaintiff is successful is to enjoin Dr. Davila from issuing letters, not to enjoin him from interpreting EHA-B in his official capacity." However, the "appropriate relief" stated by Davila is precisely what the School District seeks.

In its complaint, the School District has asked for an injunction enjoining Davila from "taking any action in Indiana to enforce his position as evidenced in the New Letter . . ." In its briefs the School District has repeatedly argued that "the ultimate correctness of defendant's position on continued services" is neither contested nor essential to the Court's analysis.

The School District's briefs, coupled with the relief sought in its complaint, makes it clear that the School District is not, as Davila contends, seeking to enjoin him from issuing interpretive letters in his official capacity. Rather the School District is seeking to enjoin Davila's position taken in the New Letter from being enforced until the APA's notice and comment requirements have been satisfied, on the theory that the Letter is not merely interpretive but is, in fact, legislative.

The Court finds that a favorable decision on the merits of the case would grant the relief sought by the School District. As the School District has also stated a threatened injury traceable to Davila, the Court holds that the School District has standing to bring this suit. Consequently, Davila's motion to dismiss on the issue of standing must be denied.

Davila's fourth, and final, ground for dismissal is that this cause is not ripe for decision. The doctrine of ripeness involves the question of whether there is a substantial controversy of sufficient immediacy and reality to warrant the issuance of a judgment. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972). "The problem [of ripeness] is best seen in a two fold aspect requiring us to evaluate both the fitness of the issue for judicial resolution and the hardship to the parties withholding consideration." *Abbott Laboratories v. Gardner*, 387 US. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681, 691 (1967).

First to consider is the fitness of the issue for judicial consideration. The School District has framed the issued tendered in this action as "[w]hether defendant exceeded his statutory grant of authority in issuing the New Letter on September 15, 1989, . . ." Davila admits that this is a "purely legal dispute" and that such issues are often appropriate for review. However, citing *Toilet Goods Association v. Gardner*, 387 U.S. 158, 162-64, 87 S.Ct. 1520, 1523-24, 18 L.Ed.2d 697, 701-02 (1967), Davila argues that "even a dispute as to authority

is not ripe where the factual context of enforcement proceedings will improve the ability of the Court to determine the propriety for the rule or interpretation."

Davila asserts that "the letter does not specify the extent to which services must be provided, that is, whether fewer services than would be provided were the handicapped child in school, is 'appropriate' [FAPE] under those circumstances." This being so, Davila argues that this Court would be better prepared to "determine the appropriateness of and authority for the interpretation contained in the New Letter, when presented with a concrete enforcement context." The Court does not agree.

Toilet Goods, Davila's principal authority, "involved a challenge by manufacturers to an FDA regulation permitting the FDA Commissioner to suspend certification if FDA inspectors were refused access to manufacturing facilities and certain records." *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir.1990). The issue presented was whether the above regulation was properly issued within the statutory authority to promulgate regulations "for the efficient enforcement" of the FDA act. The Court found this issue purely legal, but held that this issue was not ripe for judicial resolution.

Considering the FDA's authority under the "efficient enforcement" provision, the Supreme Court stated:

> This [issue] will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA . . . We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific allegation of this regulation than could be the case in the framework of the generalized challenge made here.

Toilet Goods, 387 U.S. at 163-64, 87 S.Ct. at 1524, 18 L.Ed.2d at 701-02.

The Court finds that the issue presented for judicial consideration by the School District would not be aided by a challenge arising under a specific situation. Unlike the issue in *Toilet Goods*, the issue in the present action is whether the New Letter states legislative law requiring notice and comment under the APA, or is an interpretation which does not. The resolution of this issue does not depend on factors outside the APA and EHA-B. The School District is not questioning the substantive validity of the New Letter at this time; it questions the manner in which it was promulgated. Accordingly, the Court holds that the issue tendered in this action is appropriate for judicial resolution.

The second consideration under the doctrine of ripeness is the hardship to the parties if consideration is withheld. Davila argues that there is no advance action required by the School District because the need for providing homebound services will arise only in future specific situations. Hence no hardship to the School District will result if this action is delayed.

The School District counters that there is indeed hardship: "plaintiff must begin the school year in less than three (3) weeks with at least a $100,000 budgetary shortfall because Indiana requires compliance with the defendant's position; plaintiff must also locate and contract for additional teacher services." Although the quoted words were made with respect to the 1990-91 school year, the same situation exists at this time with respect to the 1991-92 year. Further, the School District argues that to "test Indiana regulation at the expense of one child in the name of administrative review and ripeness . . .not only needlessly involves the student, but wastes public funds and resources to challenge defendant's actions. . . ." The Court agrees.

The Court finds that the School District is threatened with a concrete hardship that has an immediate impact on its day to day affairs. Thus, this matter is ripe for judicial review. *Natural Resources Defense Council v. Thomas*, 845 F.2d 1088, 1093 (D.C.Cir.1988); *see Koehring Co. v. Adams*, 605 F.2d 280, 282-83 (7th Cir.1979); *U.S. v. Zimmer Paper Products, Inc.*, 733 F.Supp. 1265 (S.D.Ind.1989)(defendant's forced choice to either install incinerator, which defendant believes not required or to incur fines, was sufficient to show claim ripe for review). For all of the above reasons, Davila's motion to dismiss is denied.

Summary Judgment

Summary judgment, pursuant to Rule 56, F.R.Civ.P., is proper only when there is no genuine issue of material fact. *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir.1984). The facts in this action are not in dispute. The position taken by Davila in the New Letter has not been published in the Federal Register or Code of Federal Regulations, nor were comments taken prior to its being issued. Both parties agree that the issue is whether, as the School District asserts, the New Letter is a "legislative rule" requiring notice and comment under the APA, or, as Davila contends, merely an "interpretive rule" exempt from the APA's requirements.

"An interpretative rule expresses the agency's view of what another rule, regulation or statute means." *Allied Van Lines, Inc. v. Interstate Commerce Commission*, 708 F.2d 297, 300 (7th Cir.1983) (citing *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 37 n. 14 (D.C.Cir.1974)). It advises the public of an agency's construction of regulations that it administers. *American Medical Ass'n v. Heckler*, 606 F.Supp. 1422, 1439 (S.D.Ind.1985) "An interpretive rule simply states that the administrative agency thinks the statute means, and only reminds affected parties of existing duties." *Id.* (quoting *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C.Cir.1984)).

In contrast to the interpretive rule, a "legislative rule is issued by an agency pursuant to statutory authority implementing the statute and 'has the force and effect of law.'" *American Medical Ass'n*, 606 F.Supp. at 1439 (citing *Batterton v. Francis*, 432 U.S. 416, 425 & n. 9, 97 S.Ct. 2399, 2405-06, 53 L.Ed.2d 448 (1977)). Legislative rules are those which create law, usually implementary to an existing law. *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C.Cir.1952). The "common understanding [is] that legislative rules usually involve matters within agency expertise, which expertise notice and comment procedures are intended to sharpen." *Allied Van Lines*, 708 F.2d at 300.

Having examined the New Letter, the Court finds that it is best considered a legislative rule. On its face, the New Letter purports to be merely Davila's opinion of the meaning of 20 U.S.C. § 1412(1), but its effect is to change a long standing policy of OSERS without a corresponding change in the underlying statute or regulations.

The authority of the Secretary of Education, Davila's superior, is set out in 20 U.S.C. § 1417(b) as follows:

> In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. *No other less formal method of implementing such provisions is authorized.* (our emphasis).

Implicit in this provision is the requirement that proposed rules be published in the Federal Register with an opportunity for comment by interested persons prior to a rule taking effect. 5 U.S.C. § 553. Pursuant to the power granted to the Secretary, some 425 pages of rules and regulations have been enacted, occupying an entire volume of the Code of Federal Regulations (CFR), 34 CFR parts 300-399 (July 1, 1990).

The New Letter is obviously a substantive rule or regulation in that (1) it imposes a new and mandatory duty upon all school districts in the United States, (2) the new duty is not expressly required by EHA, and (3) contrary to the New Letter itself it is not required by *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988).

Substantive rules implement a statute or rule, and grant rights, impose obligations, or produce other significant effects on private interests. *National Treasury Employees Union v. Reagan*, 685 F.Supp. 1346 (E.D.La.1985). The New Letter and its requirements are clearly intended to be binding on plaintiff, plaintiff's class, and all states by the letter itself (" . . . [s]tates receiving EHA-B funds are statutorily obligated . . ."), and by the defendant's response to plaintiff's second set of interrogatories. It therefore purports to create law implementary to an existing law, and qualifies as a substantive rule under the above definition. *See Gibson Wine Co. v. Snyder*, 194 F.2d 329 (D.C.Cir.1952).

If the Supreme Court's opinion in *Honig* means what the defendant seems to think it means, i.e., that the Act indeed requires what his letter mandates, then the letter could perhaps be construed as interpretive. However, *Honig* does not deal with the situation in which a child has been suspended or expelled by conduct having no relation to his disability, but rather to the situation in which the conduct arises out of the disability itself. *Honig* affirms the decision of the Ninth Circuit Court of Appeals rendered in *Doe by Gonzales v. Maher*, 793 F.2d 1470 (1986) in all but one detail not here material. The key portion of the underlying *Maher* decision, in so far as the present controversy is concerned, is exactly contra the New Letter, and reads as follows:

> We do not hold, however, that a school district may never withhold educational services from a handicapped child. If the child's behavior is properly determined *not* to be a manifestation of his handicap [footnote omitted], the handicapped child can be expelled. *See Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir.1982); *S-1 v. Turlington*, 635 F.2d 342, 248 (5th Cir.)(Unit B), *cert. denied*, 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981); *Doe v. Koger*, 480 F.Supp. 225, 228 (N.D.Ind.1979). This conclusion does not conflict with the EAHCA. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services-just as it could in any other case. To do otherwise would amount to asserting that all acts off a handicapped child, both good and bad, are fairly attributable to his handicap. We know that this is not so.

793 F.2d at 1482.

The Court therefore holds that in his New Letter the defendant attempted to enact an administrative rule in a manner contrary to 5 U.S.C. § 553 and 20 U.S.C. § 1417(b), and that such action is contrary to law. Plaintiff's motion for summary judgment is granted, and that of the defendant is denied. Judgment will be entered accordingly.

JUDGMENT

The Court having this day filed its entry granting the motion of the plaintiff for summary judgment, which entry reads as follows: (H.I.), now in accordance therewith

IT IS CONSIDERED AND ORDERED that the defendant, Robert R. Davila, in his official capacity, be and he is hereby enjoined from taking any action in Indiana to enforce his position as set out in the New Letter as to plaintiff, or members of its class, or the State of Indiana.

IT IS FURTHER CONSIDERED AND ORDERED that said defendant be, and he is hereby enjoined from taking any action in Indiana against any agency of the State or public school corporation within the State which would require the continuance of educational services to an eligible child under the Education of the Handicapped Act during periods of long-term suspension or expulsion not casually related to that child's handicap.

IT IS FINALLY CONSIDERED AND ORDERED that the defendant pay the costs of this action.

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved -

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply -

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are *impracticable, unnecessary, or contrary to the* public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title shall apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; and

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

20 U.S.C. § 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that -

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1989, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be

inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from

providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

20 U.S.C. § 1417. Administration

(a) Duties of Secretary

(1) In carrying out the Secretary's duties under this subchapter, the Secretary shall -

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975 and every year thereafter, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Secretary shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

(c) Protection of rights and privacy of parents and students

The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

(d) Hiring of qualified personnel

The Secretary is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out the Secretary's duties under subsection

(a)(1) of this section without regard to the provisions of Title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

September 15, 1989

Mr. Frank E. New, Director
Division of Special Education
Department of Education
State of Ohio
933 High Street
Worthington, Ohio 43085-4087

Dear Mr. New:

Thank you for your letter to the Office of Special Education Programs (OSEP), concerning the application of State suspension and expulsion policies under Part B of the Education of the Handicapped Act (EHA-B). Because your inquiry raised complex legal and policy issues, additional time was needed to respond. We apologize for any inconvenience that this delay may have caused you or your staff.

Specifically, you asked if it would be permissible, under both Section 504 of the Rehabilitation Act of 1973 (Section 504) and EHA-B, to exclude a child who is handicapped and cease educational services to that child if it is determined that the child's misconduct is not a result of the child's handicapping condition. For the reasons set out below, we conclude that while terminating educational services to a child who is handicapped under these circumstances is permissible under Section 504, it is not permissible under the EHA-B.

Section 504 is a civil rights statute enforced by the Office for Civil Rights (OCR) that prohibits discrimination against any person with handicaps, whereas EHA-B is a statute that establishes a financial assistance program to aid with the special education of eligible students with handicapping conditions. While the EHA-B establishes specific requirements that must be

followed for EHA-B funding, Section 504 prohibits discrimination to be eligible for *all* Federal funding. Simply stated, just because an action is not prohibited by Section 504 prohibition on discrimination does not mean that the action is necessarily permissible under the EHA-B's provisions requiring that each child receive a free appropriate public education.

The EHA-B has been found by the U.S. Supreme Court in its decision in *Honig v. Doe*, 108 S.Ct. 592 (1988), to prohibit State or local school authorities from unilaterally excluding children with handicaps from the classroom for dangerous or disruptive conduct arising from their handicapping condition. However, the Court explained that this ruling does not "leave educators hamstrung" as follows:

> Our conclusion that Sec. 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, '[W]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others . . . .' More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to ten school days.
>
> This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a 'cooling down' period during which officials can initiate IEP review and seek to

> persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief.

108 S.Ct. at 605.

It is the position of this Office that discipline of a child with a handicap, whether or not the misconduct is related to the child's handicapping condition, must be consistent with the child's right to educational services under the EHA-B. In order for a State to qualify for assistance under the EHA-B, a State must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. 1412(1); *see also* 34 CFR § 300.121(a). Thus, we conclude that all children with handicaps — including those who have been suspended or expelled — must be provided a free appropriate public education.

This conclusion is also supported by the legislative history of the EHA-B. The EHA-B "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. REP. NO. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430. *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (1972), one of the important of these cases, involved the exclusion from educational services of children with handicaps with behavioral problems Congress relied heavily on the *Mills* decision in its deliberations over the EHA-B. *Timothy W. v. Rochester*, 875 F.2d 954, 968 (1st Cir. 1989). The *Mills* Court ordered that:

> No child eligible for a publicly-supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided:
>
> (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants and,
>
> (b) a Constitutionally adequate prior hearing and periodic review of the child's status, progress. and the adequacy of any educational alternative. S. REP. NO. 168 at 6.

This supports our conclusion that Congress did not intend for educational services to cease for children with handicaps who were removed from schools as a result of behavioral problems.

In accordance with the above, local school districts in Ohio should be made aware that States receiving EHA-B funds are statutorily obligated to provide eligible children with handicaps with educational services, including during those periods of long-term suspension or expulsion where such disciplinary action results from misbehavior that is not a manifestation of the child's handicap.

We hope you find this information helpful. Please let me know if we can provide additional assistance.

Sincerely,

Robert R. Davila
Assistant Secretary